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November 4, 1994

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Spanish Broadcasting System of Florida, Inc.
Radio Station WZMQ(FM)
Key Largo, Florida
MM Docket No. 93-136

Dear Mr. Caton:

On behalf of Spanish Broadcasting System of Florida, Inc., licensee of the above-referenced radio station and a petitioner in the above-referenced rulemaking docket, there is transmitted herewith an original and four (4) copies of its Motion to Dismiss or Opposition to Petition for Reconsideration.

Should any questions arise with regard to this matter, kindly communicate directly with this office.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS
& HANDLER

By: Bruce A. Eisen
Bruce A. Eisen

Enclosure

BAE:lw

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	MM Docket No. 93-136
Table of Allotments	)	RM-8161
FM Broadcast Stations	)	RM-8309
(Clewiston, Fort Myers Villas,	)	RM-8310
Indiantown, Jupiter,	)	
Key Colony Beach, Key Largo,	)	
Marathon and Naples, Florida)	)	

TO: Chief, Allocations Branch
Mass Media Bureau

MOTION TO DISMISS OR OPPOSITION TO PETITION FOR RECONSIDERATION

SPANISH BROADCASTING SYSTEM OF FLORIDA, INC.

Bruce A. Eisen
Kaye, Scholer, Fierman, Hays & Handler
901 15th Street, N.W.
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(202) 682-3500

November 4, 1994

SUMMARY

The Acting Chief, Allocations Branch, released a Report and Order which amended the FM Table of Allotments pursuant to the request of Spanish Broadcasting System of Florida, Inc. In so doing, the counterproposal urged by Joint Petitioners was dismissed for a failure to timely commit to the reimbursement of a radio station that would have been forced to change channels.

The Allocations Branch correctly dismissed the counterproposal because established Commission policy holds that a counterproposal must be technically and procedurally correct at the time of its filing. The omission in this particular counterproposal was not cured by a subsequently filed commitment within the pleading cycle.

SBSF's comments demonstrated sound public interest reasons for the Commission to have adopted its proposal. Not only would the proposal have cured a significant RITOI problem that plagued the reception of a Plantation Key, Florida radio station, it would also have alleviated future difficulties in the provision of electrical power to residents and businesses located in the Keys.

The Joint Petitioners raised no valid question about the bona fides of the information that SBSF presented to the Commission during the course of the rulemaking. Hence, there is absolutely no basis for the Allocations Branch to reconsider the Report and Order released in this proceeding.

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BEFORE THE

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Key Colony Beach, Key Largo,	)	
Marathon and Naples, Florida)	)	

TO: Chief, Allocations Branch
Mass Media Bureau

MOTION TO DISMISS OR OPPOSITION TO PETITION FOR RECONSIDERATION

Spanish Broadcasting System of Florida, Inc. ("SBSF"), licensee of Radio Station WZMQ(FM) at Key Largo, Florida, hereby requests the Allocations Branch to dismiss the Joint Petition for Reconsideration filed on behalf of Amaturo Group, Ltd, WSUV, Inc., and Jupiter Broadcasting Corporation ("Joint Petitioners"). Alternatively, SBSF opposes the petition on its merits and requests that the petition be denied. In support thereof, the following is shown:

I. BACKGROUND

SBSF filed a Petition for Rulemaking on December 17, 1992 which proposed the substitution of Channel 292C2 for Channel 280C2 at Key Largo, Florida and the concomitant modification of the WZMQ(FM) license to operate on that channel. The substitution compelled channel changes at Key Colony Beach, Florida and at Marathon, Florida. In the former community the

construction permit of Station WKKB(FM) required modification to operate on Channel 280C2, while in Marathon, Station WAVK(FM)'s license required modification to operate on Channel 288A.

The petition and the subsequently filed supporting comments were based upon interference and public safety factors. SBSF noted that Station WZMQ(FM) shared an antenna site with Station WKLG(FM), a facility which operated on Channel 271C2 at Rock Harbor, Florida, and that Receiver-Induced Third Order Intermodulation ("RITOI") interference was plaguing the reception of Station WCTH(FM), operating on Channel 262C1 at Plantation Key, Florida, with facilities approximately 19 kilometers southwest of the WZMQ/WKLG antenna site.

SBSF proposed the rearrangement of channels to mitigate the interference that had resulted from the co-location of the WZMQ(FM) and WKLG(FM) transmitting antennas. It showed that the new allotments and separations would largely cure the RITOI problem, and it acknowledged its responsibility, should it ultimately be awarded a construction permit for Channel 292C2, to reimburse the licensees of Stations WAVK(FM) at Marathon and WKKB(FM) at Key Colony Beach for the reasonable and prudent costs attendant to a change in frequency, as required by the Commission in Circleville, Ohio, 8 FCC 2d 159(1967).

The Chief, Allocations Branch released a Notice of Proposed Rulemaking and Order to Show Cause, 8 FCC Rcd 3886 (1993), which set forth SBSF's proposal and invited comments from the public.

The Notice recited that no evidence of interference had been submitted and requested SBSF to do so in its comments.

Comments were filed by a number of parties, including Florida Keys Electric Cooperative Association, Inc. ("FKEC"), an electricity cooperative consisting of homeowners and businesses that provides electricity to various communities in the Florida Keys. FKEC's comments referred to the interference caused to Station WCTH(FM) and pointed out that the cooperative used the station's subcarrier for its load control. FKEC observed that WCTH(FM)'s power, height, and central location uniquely positioned that facility to provide the cooperative with effective load control, without which FKEC's ability to furnish an uninterrupted supply of electricity to the Keys during peak loads would have been adversely affected. It urged the Commission to adopt SBSF's allocation proposal. The Commissioner of Plantation Key Government Center filed supporting comments as well, pointing to the electricity problems that the Keys could experience if the interference continued.

As requested, SBSF submitted technical statements to establish the existence of serious RITOI intermodulation interference. Informal reception tests had been accomplished in the Key Largo area, and the tests had shown that the problem resulted from the non-linear mixing of signals in the FM receivers within a mile of the co-located transmitting antennas. Further tests by Carl T. Jones Corporation confirmed RITOI interference to Station WCTH(FM) caused by the frequency

assignments and co-location of the WZMQ/WKLG transmitters. WCTH(FM) noted numerous complaints from listeners concerning their inability to receive the station's signal in the Key Largo area on various kinds of radios.

The Joint Petitioners filed a counterproposal on September 21, 1994. They sought no less than five channel substitutions for four licensees and one permittee. However, the counterproposal failed to satisfy the Circleville standard, because the Joint Petitioners omitted the requisite reimbursement commitment to Sterling Communications, Corp., licensee of Station WSGL(FM) at Naples, Florida, one of the licensees who would have been required to change channels by virtue of the allotment scheme set forth in the counterproposal.[1]

In his Report and Order, 9 FCC Rcd 4051 (1994), the Acting Chief, Allocations Branch, dismissed the counterproposal while all comments filed in response to the counterpropsal were held to be moot. In so holding, the Acting Chief stated that the Joint Petitioners had not complied with the Commission's rule that counterproposals must be technically and procedurally correct at the time of their filing. The channel substitutions proposed by SBSF were adopted, and the FM Table of Allotments was amended accordingly.

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[1] The Joint Petitioners had made a Circleville commitment to the licensee of Station WAFC(FM) at Clewiston, Florida which also would have been required to change frequencies pursuant to the counterproposal. However, not until it submitted its Joint Reply Comments was the necessary reimbursement commitment to WSGL(FM) offered.

II. THE PETITION FOR RECONSIDERATION IS LATE-FILED

Section 1.429(d) of the Commission's Rules provides that a petition for reconsideration must be filed with the Commission within 30 days from the date of public notice of such action as that date is defined in Section 1.4(b) of the Rules. Section 1.4(b)(3) defines the date of "public notice" as follows:

> For rulemakings of particular applicability, if the rulemaking document is to be published in the Federal Register and the Commission so states in its decision, the date of public notice will commence on the date of the Federal Register publication date. If the decision fails to specify Federal Register publication, the date or public notice will commence on the release date, even if the document is subsequently published in the Federal Register.

The Joint Petition was filed within 30 days of the date that a summary of the Report and Order was inserted into the Federal Register. 59 Fed. Reg. 43064 (Aug. 22, 1994). However, the date which triggered the 30-day period for filing a petition for reconsideration was not August 22, but rather August 16, 1994, the release date of the Report and Order. Thus, the September 21, 1994 Petition for Reconsideration has been filed more than 30 days after the relevant release date and should be dismissed as late-filed. The Report and Order did not specify Federal Register publication, so even though a summary of the document was published in the Federal Register, Section 1.4(b)(3) of the Rules required a filing on or before September 15, 1994. Pursuant to Section 405(a) of the Communication's Act of 1934, as amended, a petition for reconsideration must be filed with the

Commission within 30 days from the date upon which public notice is given of the order, decision, report, or action complained off. The Commission does not have the authority to extend or waive this 30-day filing period. See, Metromedia, Inc. 56 FCC 2d 909, 909-10 (1975), recon. denied, 59 FCC 2d 1189(1976).[2]

The Joint Petition for Reconsideration is an untimely document unaccompanied by a satisfactory explanation that would justify its late filing. For this reason, the petition should be dismissed and cannot be considered under Section 405 of the Act and Section 1.106 of the Commission's Rules. See, William Penn Broadcasting Co., 53 FCC 2d 1248 (1975); Storer Broadcasting Co., 41 FCC 2d 792 (1973).

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[2] Rulemakings of particular applicability are those rulemaking proceedings which provide for notice and comment and which, although they may impact on the public, do not so directly affect preexisting legal rights or obligations as to require Federal Register publication. See, American Broadcasting Companies, Inc. v. FCC, 682 F.2d 25 (2nd Cir. 1982). In addition, rulemaking proceedings involving amendments to the Tables to do not involve substantial impact on a significant number of entities. See, Regulatory Flexibility Act - 1980, 84 FCC 2d 791, 792 (1981). This shows that the Commission has recognized that channel allotment rulemaking proceedings are "rulemakings of particular applicability".

SBSF acknowledged that the Policy and Rules Division, Mass Media Bureau, has taken the position that broadcast allotment proceedings are not rulemakings of particular applicability, so that a computation for filing a petition for reconsideration of a Report and Order may be made on the basis of Federal Register publication. Prineville and Sisters, Oregon, 8 FCC Rcd 4471 (1993). SBSF disagrees with that interpretation and points to the August 9, 1993 Application for Review of that decision which remains pending before the Commission. Should the Commission act favorably upon the Application for Review, then the Joint Petition may be summarily dismissed.

III. THE COUNTERPROPOSAL WAS PROPERLY DISMISSED

In the event that the Joint Petition for Reconsideration is not dismissed, it should be denied on the merits. The Allocations Branch correctly dismissed the counterproposal for a failure to properly pledge reimbursement of expenses to WSGL(FM).

The Joint Petitioners must bear the consequences of their omissions. If this were not so, Commission processing standards would be seriously undermined. They attack the cases cited in the Report and Order, but fail to adequately come to terms with the unalterable fact that they did have clear notice of the Commission's policy regarding reimbursement commitments in channel substitution cases. Plain and simply, a counterproposal -- no less than an initial petition proposing a rulemaking -- must be correct and complete at the time it is filed. The Commission's procedural rules are designed to provide adequate opportunity for interested parties to fully participate in the decisionmaking process and to avoid prejudice to competing parties by providing predictable, uniformly applicable rules. If it were otherwise, the Commission could not possibly conduct its business with the kind of certainty that results from the adherence to appropriate administrative standards. Parties before the Commission who fail to meet the standards have always risked the prospect of dismissal. Cf., United States v. Storer Broadcasting Company, 351 U.S. 192 (1956), and Ranger v. FCC, 294 F2d 240 (D.C. Cir. 1961).

In Table of Allotment rulemaking proceedings, the Commission requires a reimbursement commitment at the time of the original filing so that the rulemaking can be conducted in an orderly fashion. Consideration of a late-filed reimbursement commitment diminishes the integrity of the Commission's processes, and the Joint Petitioners' use of competent counsel must assume sufficient familiarity with Commission processes to have enabled them to have filed an appropriate counterproposal, ab initio.

The Joint Petitioners first attack the Allocation Branch's use of Fort Bragg, California, 6 FCC Rcd 5187 (1991), as well as Broken Arrow and Bixby, Oklahoma and Coffeeville, Kansas, 3 FCC Rcd 6507 (1988), recon. denied, 4 FCC Rcd 6981 (1989), alleging that those decisions do not support a conclusion that counterproposals must be technically and procedurally correct at the time that they are filed. They contend that these cases may have warranted dismissals because they involved counterproposals with "major technical defects" that would otherwise have rendered the proposals ungrantable. That's nonsense! It is not for the Joint Petitioners to determine what is or is not a decisional omission. Fort Bragg provided them ample notice of Commission policy, by not only dismissing an imperfect counterproposal, but also citing directly to Eldorado and Lawton, Oklahoma, 5 FCC Rcd 6737 (1990), a case which pointedly states the well established proposition that a counterproposal must be technically correct and substantially complete when filed (Emphasis added). The reason for this policy is evident. If a counterproposal were

incomplete, procedurally or technically deficient, all affected parties would not have an adequate opportunity to fully respond in reply comments. If exceptions to the standard become commonplace, there would be significant disruption to the rulemaking process, a matter which must be of paramount concern.

It does no good for the Joint Petitioners to attempt to obscure the unambiguous policy of the aforementioned cases by trying to distinguish the law in Brookville and Punxatawney, Pennsylvania, 3 FCC Rcd 5555 (1988).[3] They claim that the Brookville policy gave no explicit warning to prospective filers of counterproposals in allotment proceedings that, absent appropriate reimbursement statements on the filing date, the counterproposal would be dismissed as defective. Such an analysis transcends reason. A counterproposal in an allotment rulemaking represents nothing more than a channel assignment option that has been offered for the first time by a party or parties having an expressed interest in the allocation scheme urged in the counterproposal. No reason exists to treat a counterproposal differently than the initial rulemaking with which it may conflict. Hence, when Commission holdings dictate that a counterproposal be complete when filed, there can be no question but that this requirement includes the need to provide a reimbursement commitment to all licensees and/or permittees who

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[3] The holding in Brookville and Punxatawney, required the Circleville commitment in cases where competing expressions of interest mandated channel changes by existing licensees to accommodate the new allotment.

might be forced to change channels. Elemental fairness and sound procedural constraints demand that the Brookville policy apply equally to counterproposals.

The Joint Petitioners argue that dismissal of the counterproposal is not warranted in light of the decisions in such cases as Mary Esther, Apalachicola and Croftville, Florida, 7 FCC Rcd 417 (1992), York, Alabama, 4 FCC Rcd 6923 (1992), and East Wenatchee, Ephrata and Chelan, Washington, 8 FCC Rcd 5193 (1993). These cases, each of which involve Commission admonitions against defective applications and resultant dismissals, lend no support to the Joint Petitioners. In Mary Esther, the fact that the Allocations Branch stated that the petition "and the record" did not contain a reimbursement pledge does not mean that the petitioner could have offered such a commitment at any time prior to the close of the pleading cycle. The phrase "petition and the record" is not disjunctive. It surely does not open an allotment rulemaking proceeding to a late-filed reimbursement pledge, nor does it contravene the established principals set forth in Brookville, supra and Eldorado, supra.

The Joint Petitioners' reliance upon East Wenatchee is similarly misplaced. Simply because the Allocations Branch stated, therein, that a failure to make a reimbursement pledge "could result in a denial of a proposal", does not signal a permissive approach intended to liberalize the rule that counterproposals must be complete when filed. The word "could",

standing by itself, is a warning that proponents must comply with established processing standards.[4] Neenah-Manesha, Rhinelander and Rudolph, Wisconsin, 7 FCC Rcd 4594 (1992), is also inapposite. There, a failure to serve a rulemaking petition on a potentially affected station was deemed to be of no consequence because the Commission, itself, had mailed a copy of the Notice of Proposed Rulemaking to the station upon the release of the document. The station could thereupon have filed comments without any procedural or substantive impediments. Here, on the other hand, a basic requirement was omitted from the counterproposal, rendering it deficient and subject to dismissal.

Whether or not the omission of the proper reimbursement commitment was inadvertent, the Joint Petitioners have failed utterly to comply with established procedures. They contend that the omission, "cured" by a subsequent pleading, should not have resulted in dismissal of the counterproposal because such treatment serves no administrative goal. That is simply untrue, because there is a valid administrative goal in maintaining the integrity of the Commission's rules and policies. The Joint Petitioners had ample notice from past cases that their counterproposal would be held to a high standard of completeness at the time it was filed, and that to deviate from that standard would be to risk dismissal. An Administrative agency is under an

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[4] Perhaps there is a reasonable argument that a rulemaking which goes unopposed can result in some additional procedural leniency. But where, as here, the rulemaking becomes adversarial, such loosened treatment would be grossly unfair.

obligation to follow its own rules and procedures. See, American Federation of Government Employees v. Federal Labor Relations Authority, 77 F2d 751, 759 (D.C. Cir. 1985). Thus, the Allocations Branch not only had the right to dismiss the counterproposal, it had an obligation to do so, or else, itself, dilute the expressed policy of the cited cases.

The Joint Petitioners cite Lonoke, Arkansas and Clarksdale, Mississippi, 6 FCC Rcd 4861 (1991), as a case at odds with the Report and Order, a contention which is absolutely incorrect. In Lonoke, a proponent of a counterproposal failed to state its commitment to share in the reimbursement of the station which would have had its license modified through a channel substitution. The Allocations Branch dismissed the counterproposal as defective, citing Brookville and York, and holding, as follows:

> Even if CBC's counterproposal had been accepted into this proceeding and considered comparatively with RCI's counterproposal, it would not have prevailed because the population in the gain area for the Clarksdale station is substantially greater than that for the Charleston station.

From this, the Joint Petitioners argue that the Lonoke counterproposal was dismissed only after the Allocations Branch had concluded that it would have lost on a comparative basis. Can it be that the Joint Petitioners believe that dismissal is appropriate only if the unlucky party has advanced a proposal that in some way lacks merit? Nothing could be further from the truth. Even a cursory review of Lonoke demonstrates that

dismissal of the counterproposal had no relationship to the comparative merits of the alternative proposals.

IV. SBSF's PROPOSAL WAS PROPERLY GRANTED

The Joint Petitioners contend that SBSF failed to justify the channel substitutions approved in the Report and Order. In this regard, they argue that SBSF filed inadequate technical data in support of the proposal and that no details concerning interference complaints were submitted. They opine that "one could reasonably infer that the alleged intermodulation problem is more important to SBSF than to the licensee of the station supposedly being interfered with".

To begin with, the Joint Petitioners have demonstrated a profound lack of understanding of RITOI interference. They rail against SBSF for an alleged failure to submit "mathematical algorithms demonstrating the combination of frequencies which would likely cause intermodulation on the frequency used by WCTH(FM)." However, the "mathematical algorithm" is: 2 X 102.1 (WKLG) - 103.9 (WZMQ) = 100.3 (WCTH).[5] This combination of frequencies does cause documented interference, not intermodulation as the Joint Petitioners state, in a number of fixed radio receivers on the frequency utilized by WCTH(FM). The presence of intermodulation is not measurable when the effect occurs in receivers. However, interference can be observed and evaluated in relevant terms. For instance, the comments

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[5] Cf. WKLX, Inc., 6 FCC Rcd 225, 228, f.n.2 (1991).

submitted by FKECA and Mary Kay Reich, along with the statements of the technical consultants included in SBSF's comments, reflect the observed adverse RITOI effects. Moreover, an engineering report filed with WZMQ(FM)'s application for license (File No. BALH-930427KA) contains spectrum plots and a detailed description of the measurement equipment used and the potential for RITOI interference. In short, the tests and measurements that have been submitted, together with the actually experienced interference, demonstrate the existence of the RITOI problem and its potential effect on public safety as well as to WCTH(FM) listeners.

The Joint Petitioners have urged nothing more than speculation and surmise in attempting to question the showing made by SBSF in support of its petition. As such, their arguments are entirely unpersuasive.

V. SBSF STATEMENTS OF FACT WERE ACCURATE AND VERIFIABLE

The Joint Petitioners allege that SBSF made factual misrepresentations to such a degree that the Allocation Branch should not have granted its proposal and should have terminated the proceeding without further inquiry. That contention is spurious.

Attached to this Opposition is the statement of Henry E. Hurst, Jr. of Carl T. Jones Corporation. Mr. Hurst provides information in response to the Joint Petitioners claims that SBSF has submitted inaccurate data in the course of this rulemaking

proceeding. In particular, the statement addresses the question of a permissible site area for the Fort Myers Villas allotment, an underserved loss area that would be created by implementation of the counterproposal, and the unsuitability of the Punta Rassa reference site which the Joint Petitioners apparently believe to be adequate for the Fort Myers Villas upgrade. In short, the Joint Petition raises no serious question about the bona fides of the information which SBSF has provided during the course of this proceeding.

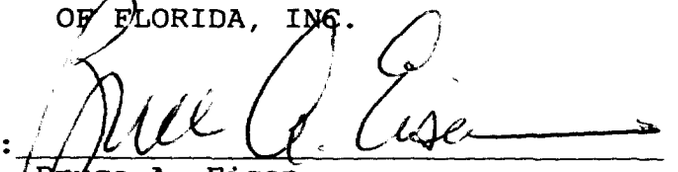
VI. CONCLUSION

The Allocations Branch was right to dismiss the incomplete and defective counterproposal. The Branch was also correct in adopting the allotments urged by SBSF.

In light of the foregoing, the Joint Petition for Reconsideration should be dismissed the result of its untimely filing or, in the alternative, denied on the merits.

Respectfully submitted,

SPANISH BROADCASTING SYSTEM
OF FLORIDA, INC.

By: 
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November 4, 1994

Exhibit 1

ANDREWS OFFICE PRODUCTS CAPITOL HEIGHTS, MD (K)

EXHIBIT 1

STATEMENT OF HERMAN E. HURST, JR.
IN SUPPORT OF AN
OPPOSITION TO A PETITION FOR RECONSIDERATION
IN MM DOCKET NO. 93-136

Prepared for: Spanish Broadcasting Systems of Florida, Inc.

I am a Radio Engineer, an employee in the firm of Carl T. Jones Corporation, with offices located in Springfield, Virginia. My education and experience are a matter of record with the Federal Communications Commission.

This office has been authorized by Spanish Broadcasting Systems of Florida, Inc. ("SBS"), licensee of WZMQ(FM), Key Largo, Florida, to prepare this statement and supporting figures in support of an Opposition to a Petition for Reconsideration in MM Docket No. 93-136.

1. Petitioners' Ft. Myers Villas Allotment Reference Site

The Petitioners specified an unsuitable allocation reference site for the Fort Myers Villas upgrade. As a result, their proposal does not adhere to basic sound allotment policy, and the counterproposal is fatally flawed.

The proposed channel change and upgrade for Fort Myers Villas on Channel 275C2 is technically unacceptable because the reference coordinates specified for the upgraded channel to serve Fort Myers Villas define an unsuitable site upon Sanibel Island (hereinafter, "Sanibel reference site"). The Sanibel reference site is located in a sensitive

wildlife/exotic plant conservation area bordering the Bailey Tract of the JN (Ding) Darling National Wildlife Refuge. Nothing in the Joint Petition changed this fact; the reference coordinates for the Fort Myers Villas upgrade are unchanged and lie upon Sanibel Island in an unsuitable location.

The unsuitability of the Sanibel reference site was originally introduced in the SBS Reply Comments. In order to de-emphasize the site's unsuitability, the Petitioners discussed, but did not amend to, an alternate reference site for the Fort Myers Villas upgrade on Punta Rassa.

The Fort Myers Villas Permissible Site Area inadvertently became a point of contention in this proceeding. The pertinent fact is that the Sanibel reference site is unsuitable. Any reference to the permissible site area is superfluous. Similarly, the Petitioners persistent attempts to justify Punta Rassa as a suitable allocation point reference area are irrelevant.

However, SBS must respond to the misleading statements submitted on behalf of the Petitioners regarding the two (2) allotment reference sites for the Fort Myers Villas upgrade.

1(a). The Sanibel Reference Site

The Sanibel reference site is located in an area occupied by sensitive wildlife, including a number of endangered species, and exotic plant life. The allocation reference site is accessible only via Island Inn Road, a dead end, dirt road open to local traffic only (See Figure 1 - "End of Island Inn Rd., approx. 1000 feet from Sanibel reference site"). The road, primarily a foot path, defines the northern border of the Bailey Tract conservation area[1]. One must pass through an area in which the Sanibel-Captiva Conservation Foundation is conducting an exotic plant preservation/restoration effort in order to reach the Sanibel reference site. The Sanibel-Captiva Conservation Foundation owns nearly 1,000 acres of land on Sanibel, a portion of the Conservation Foundation's land is directly adjacent to the Sanibel reference site.

The Sanibel reference site is pictured in Figure 3. Tower construction in this area would have a severe adverse impact on wildlife, plant life, and the sensitive surrounding environment. In addition, current zoning restrictions do not permit construction of a broadcast tower at the Sanibel reference site[2]. For all of the above reasons, the Sanibel reference site is unsuitable.

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[1]Figure 2 is a photograph in the direction of the Sanibel reference site taken from a trail head in Bailey Tract. All the land pictured in Figure 2 is a National Wildlife Refuge. The Sanibel reference site lies approximately 200 feet beyond the tree line.

[2]Supporting documentation has been submitted by SBS during this proceeding concerning the adverse environmental impact and zoning restrictions associated which the construction of a tall broadcast tower on Sanibel Island.

1(b). The Punta Rassa Reference Site

Figure 4 is a photograph of the alternate allocation reference point for the Ft. Myers Villas upgrade (hereinafter, "Punta Rassa reference site") introduced by the Petitioners in their March 7, 1994, Supplemental Joint Comments. As stated in previous pleadings, the Punta Rassa reference site, which the Petitioners now refer to as "suitable" for the Ft. Myers Villas upgrade, is slightly off the Punta Rassa shoreline in San Carlos Bay.

Referring to Figure 4, the location of the Punta Rassa reference site is midway between the photographer and the shoreline. Obviously, the Punta Rassa reference site does not satisfy the "suitable site" requirement because the point is in the water. As stated in earlier pleadings and not contested by the Petitioners, the Commission specifically included offshore sites in an example of unsuitable allotment reference sites[3].

Further, assuming that the Punta Rassa reference point was located on the nearest land, which according to the geographical coordinates it is not, the site would then lie within Lee County Public Park land. The Lee County Park, identified by the Frizzell-Kontinos Boat Ramp sign pictured in Figure 5, is another obvious example of an

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[3]See *Report and Order* concerning the *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application*, MM Docket No. 92-159, Adopted June 4, 1993, Released July 3, 1993, Paragraph 19, Footnote 13.

unsuitable allocation reference site location. The Petitioners were most likely aware of this fact but chose only to disclose that the park/boat ramp facility was located on Punta Rassa; not that the Punta Rassa reference site was located in the park (See Joint Reply to Opposition, Exhibit 2, Page 2). For all of the above reasons, the Punta Rassa reference site is unsuitable.

2. SBS Representation of Petitioners Gain and Loss Areas

Throughout this proceeding, and in the Joint Petition on pages 16 and 17, the Petitioners repeatedly accuse SBS of various misrepresentations of the counterproposal's gain and loss areas. These claims are false and misleading.

2.(a) WAFC-FM, Clewiston, Florida

In its August, 1993, Reply Comments, SBS represented the WAFC-FM, Clewiston, Florida, authorized primary service area and the primary service area resulting from the facility proposed in the Petitioners counterproposal. A area which would lose an aural service (loss area) was created and area which would gain an aural service (gain area) was created. The Petitioners state that SBS failed to consider AM signals when falsely concluding that the WAFC-FM loss area would be underserved[4].

[4] See Joint Petition, Page 17, Footnote 19.